(2)

No. 06-602

IN THE

Supreme Court of the United States

STATE STREET BANK & TRUST COMPANY,

Cross-Petitioner,

v.

JERRY SUMMERS, GEORGE T. LENORMAND, JEFFERY D. CRITES, LOUISE VAN RENSBURG and JAMES E. SHAMBO, individually and on behalf of all others similarly situated,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONSE TO CONDITIONAL CROSS-PETITION

STEVE W. BERMAN
Counsel of Record
NICHOLAS STYANT-BROWNE
ANDREW VOLK
TYLER WEAVER
HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Fifth Avenue, Suite 2900
Seattle, Washington 98101
(206) 623-7292

Counsel for Petitioners

QUESTION PRESENTED

Because the United States Court of Appeals for the Seventh Circuit affirmed the district court's decision granting State Street Bank & Trust's ("State Street's") motion for summary judgment, the Seventh Circuit dismissed State Street's contingent cross-appeal challenging the settlement between Plaintiff/Petitioners and State Street's co-fiduciaries, the UAL Corporation ESOP Committee members ("Settling Defendants"). State Street claimed that the bar order in the settlement agreement is improper because it extinguishes State Street's hypothetical right to bring a contribution action against the Settling Defendants in the event of a judgment against State Street. In dismissing State Street's appeal, the Seventh Circuit noted that, even if this Court were to reverse the judgment in favor of State Street such that State Street were subject to a judgment in this action, State Street would have no possible challenge to the bar order *unless* there is a right of contribution amongst co-fiduciaries under the Employee Retirement Security Act of 1974 ("ERISA"); as to that question, the Seventh Circuit noted, the Courts of Appeal are split. Accordingly, in the event that this Court reverses the judgment against State Street, Plaintiffs submit that it should also decide the following question:

Is their a right of contribution amongst breaching fiduciaries under ERISA?

PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the following are parties to the case (and are all defendants/cross-respondents who have previously settled all claims against them): UAL Corporation ESOP Committee, Marty Torres, Barry Wilson, Doug Walsh, Ira Levy, Don Clements, and Craig Musa.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. Nature of the Action	1
B. The Settlement Agreement	2
C. Cross-Petitioners' Contingent Cross-Appeal To The Seventh Circuit	4
REASONS FOR GRANTING THE PETITION	6
A. The Courts of Appeal Are Split On The Question Of Whether There Is A Right Of Contribution Under ERISA	6
B. Setting a Uniform Standard Is Necessary Given the Amount of Pending Litigation Concerning These Issues	9
C. The "Relief" Sought By State Street In Its Petition Should Not Be Granted	10
CONCLUSION	11

TABLE OF CITED AUTHORITIES

Page

CASES

Center Physicians, Inc. v. Painwebber Group, Inc.,
1996 U.S. Dist. Lexis 22657 (E.D. Mo. May 8, 1996) 9

Chemung Canal Trust Co. v. Sovran Bank/Maryland,
939 F.2d 12 (2d Cir. 1991) 5, 6, 8

Cooper v. Kossan,
993 F. Supp. 375 (E.D. Va. 1998) 9

Donovan v. Robbins,
752 F.2d 1170 (7th Cir. 1985) 2

Duncan v. Santaniello,
900 F. Supp. 547 (D. Mass. 1995) 9

Free v. Briody,
732 F.2d 1331 (7th Cir. 1984) 8

Great-West Life & Annuity Ins. Co. v. Knudson,
534 U.S. 204 (2002) 8, 9, 10

Green v. Willam Masson & Co.,
976 F. Supp. 298 (D.N.J. 1997) 9

Jones v. Trevor, Stewart, Burton & Jacobsen, Inc.,
1992 U.S. Dist. Lexis 14441 (N.D. Ga. 1992) ... 9

Cited Authorities

Page

Kim v. Fujikawa,
871 F.2d 1427 (9th Cir. 1989) 5, 7, 8

Maher v. Strachan Shipping Co.,
817 F. Supp. 43 (E.D. La. 1993) 9

Massachusetts Mutual Life Ins. Co. v. Russell,
473 U.S. 134 (1984) 7

May v. National Bank of Commerce,
No. 03-2112, 2004 WL 1169995
(W.D. Tenn. Feb. 27, 2004) 8

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993) 8, 9, 10

Openshaw v. Cohen, Klingenstein & Marks, Inc.,
320 F. Supp. 2d 357 (D. Md. 2004) 8

Site-Blauvelt Eng'rs, Inc. v. First Union Corp.,
153 F. Supp. 2d 707 (E.D. Pa 2001) 9

Summers v. State Street Bank & Trust Co.,
453 F.3d 404 (7th Cir. 2006) 5, 6, 8

Toledo Blade Newspaper Unions-Blade Pension Plan v. Investment Performance Servs.,
2006 U.S. Dist. Lexis 66615 (N.D. Ohio Sept. 18, 2006) 8

Page

Williams v. Provident Inv. Counsel, Inc.,
279 F. Supp. 2d 894 (N.D. Ohio 2003) 8-9

MISCELLANEOUS

George Lee Fling, Jr. & Philip N. Moore, Jr.,
ERISA: A Co-Fiduciary Has No Right To Contribution and Indemnity,
48 S.D. L. Rev. 7 (2003) 9

STATEMENT OF THE CASE

A. Nature of the Action

This case is a class action brought on behalf of thousands of individuals who were participants in the United Airlines Corporation Employee Stock Ownership Plan ("United ESOP" or "the Plan") during the period from November 17, 2001, through June 30, 2003.[1] In this case, Cross-Respondents/ Plaintiffs allege that the fiduciaries of the United ESOP, including State Street Bank & Trust Company ("State Street"), breached their fiduciary duties to the Plan and its participants by failing to diversify the Plan's investment in the stock of United Airlines ("United," or "UAL") even though State Street knew that United faced extreme financial problems and a significant risk of bankruptcy. Despite unmistakably clear and unusually candid warnings from United's CEO on October 17, 2001, and repeated warnings about the company's viability over the next 10 months, the Plan's fiduciaries took no action to diversify the Plan's investments. Even after State Street concluded that there was a "high risk" that UAL would not qualify for the government loan guarantees that the Company needed to survive, State Street continued to do nothing to protect the Plan and its participants from UAL's plunge into bankruptcy that essentially wiped out the Plan's assets.[2]

---

1. R.Doc.# 178, Plfs' Add'l Facts, ¶ 1, and Exs. A-E (Class Representative Declarations) attached thereto, Appellants' App., Tab B.

2. A fuller Statement of the Case appears in Plaintiffs' Petition for Writ of Certiorari.

Without authority, State Street asserts that its "alleged liability is therefore derivative of the Committee's liability." Cross-Petition at 4. In fact, as a fiduciary under ERISA, State Street' liability is not "derivative," but is joint and several. *See, e.g., Donovan v. Robbins*, 752 F.2d 1170, 1185 (7th Cir. 1985) (quoting S. Rep. No. 93-127, 93d Cong., 1st Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4882 ("According to the Senate Report, 'any fiduciary who breaches his trust is personally liable for losses resulting from such breach, and *co-fiduciaries are jointly and severally liable. . . .*'" (emphasis added by Seventh Circuit)).

B. The Settlement Agreement

Plaintiffs entered into the Settlement Agreement with the ESOP Committee Members (the "Settling Defendants"). Plaintiffs agreed to settle with the Settling Defendants within the limits of available insurance proceeds because, as the Bankruptcy Court presiding over the UAL bankruptcy found, the Settling Defendants (who were union-member employees of UAL) "are parties without significant assets."[3]

Plaintiffs became aware that the Administrative Manual of the Airline Pilots Association ("ALPA") provides that the union may, in its discretion, indemnify ALPA members who serve as fiduciaries of ERISA plans – including two of the Settling Defendants.[4] However, Plaintiffs' counsel concluded

---

3. R.Doc.# 270, Declaration of Andrew M. Volk in Support of Plaintiffs' Motion for Final Approval of Partial Settlement ("Volk Decl."), ¶ 9, and Ex. H thereto.

4. R.Doc.# 270, Volk Decl., Ex. K; *see also* R. Doc# 271, Declaration of Jalmer Johnson at ¶ 4.

that the ALPA indemnification right was unlikely to be of any value to the settlement Class since (i) the right was "not automatic," but subject to the discretion of ALPA's Executive Council; (ii) ALPA's insurance policies exclude coverage for fiduciaries of stock ownership plans; and (iii) ALPA lacks significant assets that would be available to fund any indemnification remedy in the event that ALPA members sought and obtained such a remedy after a judgment against them.[5]

As a condition of settlement, the Settling Defendants insisted that they be protected from subsequent litigation by non-settling parties. Accordingly, the Settlement Agreement contains a bar order provision ("Bar Order") that prevents State Street from bringing any claims for contribution or indemnification against the Settling Defendants in the event this Court reverses the judgment of the Seventh Circuit and a final judgment is eventually entered against State Street.[6]

The Settlement Agreement leaves State Street in *at least* as good a position as it would have been in the absence of a settlement. That is because the Settlement Agreement also includes a generous "Judgment Reduction" provision that allows State Street to receive *the greater of* (i) a "pro tanto" reduction, which is the $5.25 million settlement amount between Petitioners and Settling Defendants or (ii) a modified proportionate fault reduction based on the value of any contribution or indemnification claim they would have

---

5. R.Doc.# 270, Volk Decl. ¶¶ 12-20 and documents cited therein.

6. R.Doc.# 210, Pls' Memo ISO Prelim. Approval of Settlement, Ex. A, Settlement Agreement at p. 11, ¶ 2.4.

otherwise been able to assert against the Settling Defendants *subject to* the ability State Street would have had to collect on such a judgment.[7]

Accordingly, while State Street complains that the Settlement cuts off its ability to obtain a judgment against the Settling Defendants and thereby forced them to seek discretionary indemnification from ALPA, *in fact,* if State Street were able to establish that (i) ERISA allows for contribution actions; (ii) it would be able to prevail in such an action against the Settling Defendants and (iii) that the Settling Defendants could and would have obtained indemnification from ALPA, then any judgment against State Street would be reduced accordingly under the terms of the Bar Order.

The district court overruled State Street's objections to the Bar Order and approved the Settlement Agreement.[8]

C. Cross-Petitioners' Contingent Cross-Appeal To The Seventh Circuit

When Plaintiffs/Petitioners appealed the district court's grant of summary judgment to the Seventh Circuit Court of Appeals, State Street filed a contingent cross-appeal from the district court's approval of the Settlement Agreement. Because the Seventh Circuit affirmed the district court's order granting summary judgment to State Street, it did not resolve State Street's appeal. State Stret's appeal would only become

---

7. *Id.* Settlement Agreement at p. 5, ¶ 1.20 and pp. 11-12, ¶¶ 2.4.2-2.4.3.

8. R.Doc.# 278, Minute Entry and Cross-Pet. App. 1a.

ripe in the event that this Court reverses the Seventh Circuit's decision. *Summers v. State Street Bank & Trust Co.*, 453 F.3d 404, 413 (7th Cir. 2006).

However, the Seventh Circuit noted, *id.*, State Street would have no possible basis upon which to challenge the Bar Order *unless* there is a right of contribution under ERISA:

> The settlement-bar approach assumes, moreover, that there is a right of contribution, *and it is unsettled whether ERISA defendants have such a right. Lumpkin v. Envirodyne Indus.*, 933 F.2d 449, 464 n.10 (7th Cir. 1991); *compare Chemung Canal Trust Co. v. Sovran Bank/Maryland*, 939 F.2d 12, 16-17 (2d Cir. 1991) (yes, contribution), with *Kim v. Fujikawa*, 871 F.2d 1427, 1432-33 (9th Cir. 1989) (no). We assumed in *Alton Mem'l Hosp. v. Metro. Life Ins. Co.*, 656 F.2d 245, 250 (7th Cir. 1981), that they do, but did not actually discuss the question, which remains an open one in this circuit. [Emphasis added.]

Indeed, if there is no right of contribution between ERISA co-fiduciaries, then the Bar Order would have to be approved since it would then indisputably leave State Street in a better position than it would be in the absence of a Bar Order. If there is no right of contribution under ERISA, the $5.25 million Judgment Reduction under the settlement would truly be a gift to State Street in the event that a final judgment is ultimately rendered against State Street in this action.

REASONS FOR GRANTING THE PETITION

Plaintiffs/Cross-Respondents submit that, if this Court reverses the district court's decision granting summary judgment in favor of State Street, then the Court should also reach the question of the propriety of the Bar Order entered by the district court as a condition of Plaintiffs' settlement with State Street's co-fiduciaries, the UAL ESOP Committee members (the "Settling Defendants"). This is the issue raised by State Street in its contingent appeal in the Seventh Circuit, and in its conditional cross-petition here. More specifically, Plaintiffs submit, if this Court reverses the judgment of the district court here such that State Street becomes susceptible to a final judgment, the Court should resolve the split amongst the Courts of Appeal regarding whether or not there is a right of contribution amongst ERISA co-fiduciaries. If there is no right of contribution, then this Court must affirm the district court's entry of the Bar Order. Indeed, if there is no right of contribution under ERISA, State Street can not be heard to claim that the Bar Order "deprived it of its right to contribution. . . ." Cross-Pet. at 4.

A. The Courts of Appeal Are Split On The Question Of Whether There Is A Right Of Contribution Under ERISA

As the Seventh Circuit recognized, the Courts of Appeals are split as to whether there is a right of contribution for co-fiduciaries under ERISA. *See Summers,* 453 F.3d at 404. The Court of Appeals for the Second Circuit squarely holds that there is a right of contribution for ERISA fiduciaries. *Chemung Canal Trust Co. v. Sovran Bank/Maryland,* 939 F.2d 12, 16-17 (2d Cir. 1991). In contrast, the Court of

Appeals for the Ninth Circuit squarely holds that there is no such right. *Kim v. Fujikawa,* 871 F.2d 1427, 1432-1433 (9th Cir. 1989).

As the Ninth Circuit stated in rejecting Fujikawa's contention that contribution actions should be available under ERISA:

> Fujikawa contends that ERISA does not and should not prohibit actions for contribution among fiduciary trustees. He argues that, in enacting ERISA, Congress provided for "broad equitable remedies," including contribution, and that actions for contribution are consistent with the language and purposes of the statute. We disagree. As the Supreme Court noted in *Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 141-42 ... (1984), section 409 of ERISA, 29 U.S.C. § 1109, only establishes remedies for the benefit of the *plan.* Therefore, this section cannot be read as providing for an equitable remedy of contribution in favor of a *breaching fiduciary.*

Fujikawa, 871 F.2d at 1432 (emphasis in original). Further, the *Fujikawa* court stated, "the Supreme Court has noted that, in light of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a comprehensive and reticulated statute, it seems clear that Congress did *not* intend to authorize other remedies [under ERISA] that it simply forgot to incorporate expressly." *Fujikawa,* 871 F.2d at 1432 (quoting *Russell,* 473 U.S. at 146 (emphasis provided by *Russell* Court, internal quotation marks omitted).

If anything, this argument has grown even stronger since the time of *Fujikawa* and *Russell,* as this Court has continued to hold that the only remedies available under ERISA are those remedies that are explicitly spelled-out in the statute. *See, e.g., Russell,* 473 U.S. at 144-148 (because statute is silent on subject of punitive damages, punitive damages are unavailable under ERISA); *Mertens v. Hewitt Assocs.,* 508 U.S. 248, 254 (1993) (quoting *Russell*) ("Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.") *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 209 (2002) (same).

Nonetheless, the Second Circuit has never retreated from its holding in *Chemung Canal,* 939 F.2d at 17-18, that there is a right of contribution as a matter of federal common law. Similarly, the Seventh Circuit Court of Appeals has suggested that there may be right of contribution under ERISA. *See Free v. Briody,* 732 F.2d 1331, 1337-38 (7th Cir. 1984); *but see Summers,* 453 F.3d at 413 (noting that the issue is an open question in the Seventh Circuit).

District courts outside of the Second, Seventh and Ninth Circuits also disagree as to whether there is a right of contribution for ERISA fiduciaries. For example, the following district court decisions held there is no right of contribution and/or indemnification amongst ERISA co-fiduciaries: *Toledo Blade Newspaper Unions-Blade Pension Plan v. Investment Performance Servs.*, 2006 U.S. Dist. Lexis 66615 (N.D. Ohio Sept. 18, 2006); *May v. National Bank of Commerce,* No. 03-2112, 2004 WL 1169995, at *2 (W.D. Tenn. Feb. 27, 2004); *Openshaw v. Cohen, Klingenstein & Marks, Inc.*, 320 F. Supp. 2d 357, 364 (D. Md. 2004); *Williams v. Provident Inv. Counsel, Inc.,* 279 F. Supp. 2d

894, 901, 902 n.4 (N.D. Ohio 2003); *Center Physicians, Inc. v. Painwebber Group, Inc.*, 1996 U.S. Dist. Lexis 22657 (E.D. Mo. May 8, 1996).

On the other hand, the following decisions recognized a right of contribution and/or indemnification amongst ERISA co-fiduciaries: *Site-Blauvelt Eng'rs, Inc. v. First Union Corp.*, 153 F. Supp. 2d 707, 709 (E.D. Pa 2001); *Cooper v. Kossan*, 993 F. Supp. 375 (E.D. Va. 1998); *Green v. Willam Masson & Co.*, 976 F. Supp. 298 (D.N.J. 1997); *Duncan v. Santaniello*, 900 F. Supp. 547, 550-51 (D. Mass. 1995); *Maher v. Strachan Shipping Co.*, 817 F. Supp. 43 (E.D. La. 1993); *Jones v. Trevor, Stewart, Burton & Jacobsen, Inc.*, 1992 U.S. Dist. Lexis 14441 (N.D. Ga. 1992). Such a view seems patently inconsistent with this Court's decisions in *Great-West, Mertens*, and *Russell. See also* George Lee Fling, Jr. & Philip N. Moore, Jr., *ERISA: A Co-Fiduciary Has No Right To Contribution and Indemnity*, 48 S.D.L. Rev. 7 (2003).

Should this Court grant Plaintiffs/Cross-Respondent's petition, and should it reverse the grant of summary judgment against State Street, it should resolved the issue of whether there is a right of contribution for ERISA fiduciaries.

B. Setting a Uniform Standard Is Necessary Given the Amount of Pending Litigation Concerning These Issues

As the many cases cited in the prior section illustrate, the issue of whether or not an ERISA defendant has a right of contribution or indemnification has arisen frequently – and there are numerous decisions on each side of the issue.

Plaintiffs/Cross-Respondents believe that a clear answer is compelled by this Court's decisions in *Great West, Mertens* and *Russell.* In any event, the split amongst the Courts of Appeal should be resolved.

C. The "Relief" Sought By State Street In Its Petition Should Not Be Granted

While State Street styles its pleading as a "conditional cross-petition," and seeks a writ of certiorari, it expressly asks this Court *not* to resolve the question it presents concerning the propriety of the Bar Order. Instead, State Street asks that this Court *remand* that issue to the Seventh Circuit Court of Appeals. Cross-Petition at 7.

Plaintiffs respectfully disagree. In the event that this Court grants Plaintiffs' petition for review and reverses the judgment in favor of State Street, this Court should resolve the issue as to whether there is a right of contribution for ERISA defendants. State Street's suggested approach is inefficient, as it would require a remand to the Seventh Circuit to come down on one side or the other of a circuit split that is already ripe for resolution by this Court.

CONCLUSION

In the event that Plaintiffs' petition for writ of certiorari is granted and this Court reverses the district court's grant of summary judgment in favor of State Street, the conditional cross-petition for a writ of certiorari should be granted to resolve the split amongst the circuit courts of appeal as to whether there is a right of contribution for co-fiduciaries under ERISA.

Respectfully submitted,

STEVE W. BERMAN
Counsel of Record
NICHOLAS STYANT-BROWNE
ANDREW VOLK
TYLER WEAVER
HAGENS BERMAN SOBOL SHAPIRO LLP
1301 Fifth Avenue, Suite 2900
Seattle, Washington 98101
(206) 623-7292

Counsel for Petitioners